Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

93-316

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

LARRY D. BARNETTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL APPENDIX

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Larry D. Barnette, pro se
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Merritt Island, FL 32952
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For Petitioner

August 20, 1993

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Order of District Court adopting the Report and Recommendation of the Magistrate dated April 6, 1990 . . A-1

Report and Recommendation of the Magistrate dated Dec. 29, 1993 . . B-1

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

LARRY D. BARNETTE,

Petitioner,

v. Case No. 83-131-Cr-J-16
88-199-Civ-J-16

UNITED STATES OF AMERICA,

Respondent.

ORDER

The above-styled cause is before the Court on the Report and Recommendation of the United States Magistrate, filed December 29, 1989. Respondent objected to said Report and Recommendation on January 11, 1990, while Petitioner objected to said Report and Recommendation on January 16, 1990, and responded to the government's objections on January 22, 1990.

After conducting a *de novo* of the entire record herein, the Court hereby adopts, confirms and ratifies the Report and Recommendation.

Accordingly, it is now

ORDERED AND ADJUDGED:

That Petitioner LARRY D. BARNETTE'S Motion made under 28 U.S.C. Section 2255, filed on March 3, 1988, be and the same is hereby DENIED, and the above-styled cause be and the same is hereby DISMISSED.

DONE AND ORDERED in Chambers in Jacksonville, Florida, this 6 day of April, 1990.

/s/ John H. Moore, II
UNITED STATES DISTRICT JUDGE

Copies to:

U.S. Attorney (Fallgatter)

Charles W. Arnold, Jr., Esquire

Larry D. Barnette
2721 Park Street
Jacksonville, FL 32204

Civil Section

U.S. Magistrate (Snyder)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

LARRY D. BARNETTE,

Petitioner,

vs. CASE NO. 83-131-Cr-J-16
88-199-Civ-J-16

UNITED STATES OF AMERICA,

Respondent.

REPORT AND RECOMMENDATION[1]

Petitioner Larry D. Barnette filed a Motion Under 28 U.S.C. Section 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody on March 3,

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[1] Objections may be filed in accordance with 28 U.S.C. Section 636, and Rule 6.02, Local Rules, Middle District of Florida, within ten (10) days after service of this document. Failure to do so shall bar the party from a de no determination by a district judge and from attack factual findings on appeal.

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1988 (herein First Motion).[2] On August 30, 1983, a federal grand jury returned a twenty-five count Indictment against Petitioner and others.[3] After a three-month jury trial before the Honorable Susan H. Black in the United States District Court for the Middle District of Florida, Petitioner was convicted and sentenced on various counts. On October 8, 1986, the United States Court of Appeals for the Eleventh Circuit affirmed the judgment of the District Court,

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[2] Petitioner has also filed pro se a second Motion Under 28 U.S.C. Section 2255 Requesting a Retrial Under the Authority Outlined in 28 U.S.C. Section 455 on October 3, 1988 (Second Motion). The issue raised in the Second Motion are addressed a Report and Recommendation entered contemporaneously with this Report and Recommendation.

[3] The facts are outlined by the United States Court of Appeals, Eleventh Circuit in United States v. Barnette, 800 F.2d 1558 (11th Cir. 1986) (per curiam).

excluding a restitution order imposed as part of the sentence. United States v. Barnette, 800 F.2d 1558, 1560 (11th Cir. 1986) (per curiam). Petitioner sought reviewed by certiorari in the United States Supreme Court, which was denied on March 23, 1987. United States v. Barnette, 480 U.S. 935 (1987).

First Motion

In his First Motion, Petitioner alleges the United States District Court wherein he was tried was without jurisdiction. It is Petitioner's view that a treaty, to which the United States and West Germany are signatories, divested the United States District Court of jurisdiction over the crimes with which he was charged. Petitioner contends that, according to the terms of the treaty,

> when an offense is committed in West Germany by a member of the American armed forces or a member of the "civilian component" of the American Armed Forces and the offense is punishable in West Germany, West Germany has primary jurisdiction to try the offender. This primary jurisdiction strips the United States of jurisdiction unless and until the United States requests, and West Germany grants, a waiver of jurisdiction.

Memorandum of Law in Support of Defendant's Motion Under 28 U.S.C. Section 2255, filed March 3, 1988 (hereinafter First Memorandum) at 3.

The treaty upon which Petitioner relies, the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces (hereinafter NATO/SOFA)[4], was signed by the United States and others on June 19, 1951. Following ratification by the Senate and

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[4] 4 U.S.T. 1792, T.I.A.S. No. 2864.

the President, the treaty went into force on August 23, 1953. See Plaster v. United States, 720 F.2d 340, 342 (4th Cir. 1984); see also Matter of Burt, 737 F.2d 1477, 1478 (7th Cir. 1984). On August 3, 1959, the United States and West Germany signed a Supplementary Agreement to NATO/SOFA[5], which went into force on July 1, 1963. Plaster, 720 F.2d at 343. Petitioner claims he and the crimes with which he was charged fall within the scope of the treaty because he was a "member of the 'civilian component' and the offenses were 'committed within the territory of the receiving State [West Germany] and punishable by the law of that State.'" First Memorandum at 3.

According to the express language of

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[5] 14 U.S.T. 531, T.I.A.S. No. 5351.

the treaty, the jurisdictional provisions set forth in Article VII of NATO/SOFA potentially apply to three categories of individuals: "members of a force or civilian component and their dependents . . . ." 4 U.S.T. 1792, 1798, T.I.A.S. No. 2846 (emphasis added). Article I, 1(a) of NATO/SOFA defines "force" as "the personnel belonging to the . . . armed services of one Contracting Party when in the territory of another Contracting Party . . . in connection with their official duties . . . ." and "civilian component" is defined in Article I, 1(b) as

> the civilian personnel accompanying a force of a Contracting Party who are in the employ of an armed service of that Contracting Party, and who are not stateless persons, nor nationals of any State which is not a Party to the North Atlantic Treaty, nor nationals of, nor ordinarily resident in, the State in

which the force is located . . . .

4 U.S.T. 1792, 1794, T.I.A.S. No. 2846, art. I, paras. 1(a) and 1(b) (emphasis added).[6] The Supplemental Agreement also makes reference to the definition of civilian component contained in Article I, 1(b) of NATO/SOFA. Article 73 of the Supplementary Agreement provides:

> Technical experts whose services are required by a force and who in Federal territory exclusively serve that force either in an advisory capacity in technical matters or for the setting up, operation or maintenance of equipment shall be considered to be, and treated as, members of the civilian component. . . .

14 U.S.T. 531, 623, T.I.A.S. No. 5351.

An evidentiary hearing was held in

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[6] "'[D]ependent' means the spouse of a member of a force or of a civilian component, or a child of such member depending on him or her for support ...." 4 U.S.T. 1792, 1794 T.I.A.S. No. 2846, art. I, para. 1(c).

connection with Petitioner's First Motion on December 4 and 5, 1989. In an effort to establish his alleged civilian component status, Petitioner called as an expert in the field of military law, Mr. Jan Horbaly. See Volume 1 of Transcript of Hearing on Petitioner's Motion for Writ of Habeas Corpus, filed December 19, 1989 (hereinafter Vol. 1), at 17-23. Mr. Horbaly testified that, based upon his review of the stamp which was placed in the Petitioner's passport and the laundry services contract with the United States Army, Petitioner was a "technical expert" within the meaning of Article 73 of the Supplementary Agreement and thus, a member of the civilian component. Vol. 1

at 36-39, 50-51.[7]

Lieutenant Colonel H. Wayne Elliott of the United States Army testified as an expert in the field of military law and in the interpretation of the Status of Forces Agreements, and specifically, NATO/SOFA. See Vol. 1 at 175-86. To determine whether Petitioner was a member of the civilian component, Lt. Col. Elliott indicated it would be necessary to examine the definitional provisions set forth in Article I of NATO/SOFA. According to Lt. Col. Elliott, Petitioner

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[7] In passing, the Court would note Petitioner initially alleged, prior to the evidentiary hearing, that he was a member of the civilian component as that term is defined in Article I, 1(b) of NATO/SOFA. First Memorandum at 10-11. However, on cross-examination by the United States, Mr. Horbaly stated Petitioner was not a member of the civilian component" [i]n a strict reading of the literal language...[of Article I, 1(b) of NATO/SOFA.]" Vol. 1 at 49.

does not fall within the definition of civilian component under Article I, 1(b), of NATO/SOFA because he was not "in the employ of an armed service." Vol. 1 at 187 (emphasis added). He explained, "[t]he people who are contemplated by this provision, Article I, 1(b),are Department of the Army civilians or Department of the Air Force civilians. An indication, in fact, [also] relevant to this particular interpretation is the Korean SOFA and the Japanese SOFA mentions contractors, but the NATO-SOFA does not." Id. Having concluded Petitioner was not a member of the civilian component under the definitional provisions of NATO/SOFA, Lt. Col. Elliott further explained that "Article 73 [of the supplementary Agreement] does not make a contractor a member of the

civilian component. . . ." Vol. 1 at 188. He explained Article 73 pertains only to logistic support which

> are those items provided by the U.S. forces to our employees or military members. Normally there are tax consequences to them. It's the ability to use the PX, the ability to use the Commissary, the ability to buy tax free gasoline, to register your car with the U.S. forces versus Germany. These are the items of logistic support that have been listed, I believe, in the letter of accreditation in this case, and we take those from the regulation and we list them in the accreditation letter.

Vol. 1 at 203. He explained that even the placement of Article 73 supports his conclusion that it does not pertain to the criminal aspects of NATO/SOFA.

> Article 73 . . . comes right after two other articles which deal with the economic issues. Article 71 which deals with non-German, noncommercial organizations, the Red Cross, the Boy Scouts, and their immunity; and the immunity of their employees from German taxation; 72 deals with non-German commercial

enterprises, those are the banks that service the U.S. Forces.

73 provides for one other group of service providers that the U.S. Forces have -- and when I say U.S. remember it's all the sending states, but for us we're talking the U.S.-Germany relationships -- that the other services might need, and that was technical experts who, when this was written, might not be readily available on the economy of Germany. So we expected that we would have to bring to Germany from the U.S. contractors who were not in our employ, but could provide a technical service to us.

Vol. 1 at 202.

While Petitioner asserts his letters of accreditation, see Petitioner's Exhibits 5-7, support his contention that he is a member of the civilian component by virtue of Article 73, Lt. Col. Elliott explained that Reg. 600-700, which is referenced in Petitioner's letter of accreditation,

pertains to logistic support that's authorized, and . . . each of these

> items . . . has monetary value so that when a contractor is declared to be a technical expert normally as a part of that value of the contract, or the price paid by the U.S. forces to the contractor is reduced by the value of each of these items, the military banking facilities, credit unions, recreation services, pet and firearm registration, and the SOFA stamp and the Customs exemption. Each of these things is reduced from the overall contract, so it saves the U.S. Government money.

Vol. 1 at 205-06. Lt. Col Elliott noted, however, that "[a]nother Appendix to that registration governs members of the civilian component who are in the employ of the U.S. Forces, and obviously their compensation is not reduced because they get these privileges." Vol. 1 at 206. Petitioner, as a contractor, would not fall into the latter category as he was not in the employ of the U.S. forces.

Likewise, although both Petitioner and Mr. Horbaly assert the stamp in the

Petitioner's passport support the contention Petitioner is a member of the civilian component, Lt. Col. Elliott's testimony also refutes this allegation. He explained that although Article III, paragraph 3, provides that "members of the civilian component and dependents shall be so described in their passport[s] . . . , if you look at Article III of the basic SOFA, that only deals with immigration, entry into and exit from a receiving state." Vol. 1 at 208. He further elaborated:

> Our direct employees, Department of the Army civilians and our dependents get passports with that stamp in them; also, by virtue of Article 73, contractors in Germany can get the stamp.
>
> In fact, if you look at USAREUR Reg. 600-700, one of the things that it says was that the privilege card which goes along with the passport, the privilege card which you need in order to make all these tax free

> purchases, will be overstamped "Not Valid In Belgium." The reason for that is that this Article 73 doesn't apply in Belgium. In Belgium you're left with the basic NATO/SOFA which does not provide any SOFA status to contractors.
>
> So the stamp is evidence of having SOFA status, it does not mean that you're actually a member of the civilian component.

Vol. 1 at 207; see also S. Lazareff, Status Of Military Forces Under Current Intentional Law 91 (1971).

Mr. Paul J. Conderman, who testified as an expert in the field of military law, German penal law, and the application of the criminal jurisdictional provisions of NATO/SOFA, see Vol. 1 at 246-69, was also of the view that NATO/SOFA was inapplicable to this case. He outlined in detail the basis for his opinion.

As noted previously, Petitioner

argues he and the crimes with which he was charged fall within the scope of the treaty because he was a "member of the 'civilian component' and the offenses were 'committed within the territory of the receiving State [West Germany] and punishable by the law of that State.'" First Memorandum at 3. On the basis of the testimony presented at the evidentiary hearing, the pleadings herein, and the rationale for the opinions expressed by Mr. Horbaly, Lt. Col. Elliott, and Mr. Conderman, the Court credits the testimony of Lt. Col. Elliott and Mr. Conderman and finds Petitioner was not a member of the civilian component. As such, Petitioner's reliance on NATO/SOFA is unfounded. In view of the Court's finding that Petitioner was not a member of the

civilian component, there is no necessity for the Court to address whether the "offenses were committed within the territory of the receiving-State [West Germany] and punishable by the law of that State.'" Id.

Alternatively, even if the Petitioner had established he was a member of the civilian component, he would not be subject to the criminal jurisdictional framework outlined in Article VII of the NATO/SOFA in light of Reid v. Covert, 354 U.S. 1 (1957), and its progeny. See Vol. 1 at 59-64, 200, 209-210; see also Volume 2 of Transcript of Hearing on Petitioner's Motion for Writ of Habeas Corpus, filed December 19,

1989, at 14-15.[8]

Recommendation

Accordingly, it is recommended Petitioner's First Motion be denied.

ENTERED at Jacksonville, Florida, this 29th day of December, 1989.

/s/ Howard T. Snyder
Howard T. Snyder
United States Magistrate

Copies to:

The Honorable John H. Moore, II
United States District Judge

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[8] The Court elected to resolve Petitioner's First Motion on the bases discussed herein and does not reach the merits of the argument Petitioner lacks standing to complain of a treaty violation. See Vol. 1 at 201.

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